



Quick Release

A Monthly Survey of Federal Forfeiture Cases

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Standing / Ancillary Proceeding / Constructive Trust

- Holders of checks drawn on defendant's account are not bona fide purchasers for value of the forfeited property, but mere general creditors who lack standing to challenge the forfeiture of the defendant's property.
- Second Circuit declines to impose constructive trust for benefit of third-party in criminal forfeiture case where petitioner could have filed a remission petition with the Attorney General.

Defendants were convicted of money laundering and agreed to the criminal forfeiture of the bank accounts they had used to commit the laundering offense. The accounts were held in the name of an Ecuadorian money exchange house that was in the business of purchasing Ecuadorian currency in exchange for dollar-denominated checks drawn on the forfeited accounts. After the Order of Forfeiture was entered, third parties who held checks drawn on the forfeited accounts filed claims in the ancillary proceeding.

The government moved to dismiss the third-party claims for lack of standing. The district court agreed and dismissed the claims, *United States v. Ribadeneira*, 920 F. Supp. 553 (S.D.N.Y. 1996), and the Second Circuit affirmed.

Under 21 U.S.C. § 853(n)(2), a third party must establish that he has a "legal interest" in the forfeited property in order to have standing to challenge the forfeiture. Under Second Circuit law, a general creditor does not have standing under

section 853(n)(2) because he lacks a legal interest in the particular assets subject to forfeiture. *See United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992). Because holders of checks drawn on a bank account are merely general creditors of the account holder, they lack a sufficient interest in the forfeited funds to have standing in the ancillary proceeding.

The petitioners attempted to distinguish *Schwimmer* by pointing out that *Schwimmer* involved section 853(n)(6)(A) which requires a person to establish a "legal right, title or interest" in the forfeited property, whereas the instant claim was brought under the bona fide purchaser provision in subsection (n)(6)(B). Subparagraph (B) only requires the petitioner to establish that he purchased a "right, title or interest." According to the petitioners, the absence of the term "legal" in subparagraph (B) meant that standing to contest the forfeiture under that statute was broader than it is under section 853(n)(2) and (n)(6)(A).

The Court of Appeals disagreed. A third party must establish standing to contest the forfeiture under section 853(n)(2) by demonstrating a legal interest in the particular assets subject to forfeiture regardless of whether his theory of recovery is based on subsection (n)(6)(A) or (n)(6)(B). Therefore, general creditors are barred from recovering as bona fide purchasers under subsection (n)(6)(B). Because the holder of a check drawn on a bank account is only a creditor of the account holder and does not have any specific interest in the funds in the account, the petitioners had no claim under section 853(n).

Petitioners argued in the alternative that they would have a specific interest in the forfeited funds if the court would impose a constructive trust in favor of the petitioners. In *Schwimmer*, the Second Circuit held that the beneficiary of a constructive trust does have standing to contest a criminal forfeiture action, but the

Court of Appeals affirmed the district court's refusal to impose a constructive trust in this case on two grounds: the petitioners failed to satisfy all requirements of New York law regarding a constructive trust, and in any event, a constructive trust is an equitable remedy that will only be imposed if the beneficiary lacks an adequate remedy at law. Here, the petitioners were free to file petitions for remission and mitigation of forfeiture with the Attorney General under section 853(i). Because that alternative provided the petitioners with an adequate remedy at law, the constructive trust was properly denied. SDC

United States v. Ribadeneira, ___ F.3d ___, 1997 WL 33524 (2d Cir. Jan. 30, 1997). Contact: AUSA Sharon Cohen Levin, ANYS01(slevin).

Standing

- **Customers and creditors of money transmitter lack standing to contest the civil forfeiture of funds in the transmitter's bank accounts.**

Defendant was a money transmitter, allegedly in the business of receiving cash from customers in the United States and transferring it to the customers' relatives in Pakistan. While not denying that Defendant may have had legitimate customers, the government believed that Defendant was actually using his business to launder money derived from heroin trafficking.

Defendant was convicted of operating a money transmitting business without a license pursuant to 18 U.S.C. § 1960 and incarcerated. Meanwhile, the government brought a civil action against the funds in Defendant's bank accounts under 18 U.S.C. §§ 981 and 984. The Defendant did not contest the forfeiture, but numerous claims were filed by individual customers who claimed that the money in Defendant's accounts was actually their money because they had given it to Defendant to transmit to

their relatives. Another claim was filed by a Pakistani company that claimed it had already forwarded money to various beneficiaries on Defendant's behalf and was waiting to be reimbursed.

The government moved to dismiss all of the claims for lack of standing, and the district court agreed. To have standing to contest a forfeiture action, a person must have a possessory or ownership interest "in the specific forfeited property," as a matter of state law. The Pakistani company, the court said, was obviously only a general unsecured creditor of the Defendant. Such creditors have no interest in particular assets or funds; they can only claim that a sum of money is due, not that they own it or exercise dominion over it in the present.

The same rule applies to Defendant's individual customers. The individuals who gave money to Defendant to put in his bank account stand in the

same position as depositors who put their money in a bank. Just as a "depositor, for his own convenience, parts with the title to his . . . money" and agrees to accept a promise of payment on demand in return, Defendant's customers voluntarily transferred title to their money to Defendant and became his creditors. They retained no signatory authority over Defendant's bank accounts nor any other sort of authority that would have allowed them power over the disposition of the funds in those accounts. Thus, the claimants lacked the possessory or ownership interest in the

property subject to forfeiture to have standing to contest the forfeiture action.

SDC

United States v. All Funds on Deposit . . . in the Name of Kahn, ___ F. Supp. ___, 1997 WL 60949 (E.D.N.Y. Feb. 11, 1997). Contact: AUSA David Goldberg, ANYE03(dgoldber).

Standing / Ancillary Proceeding / RICO

- Person who inadvertently transfers funds by wire to a defendant's account after it is seized by the government lacks standing to contest the forfeiture of those funds because they have become the defendant's property.
- RICO forfeitures are not limited to property involved in the criminal offense. RICO defendant may be made to forfeit all interests in the RICO enterprise, including the enterprise itself, regardless of when and how the assets were acquired.

Defendant's bank accounts were restrained by the government as part of a RICO prosecution. The restraining order prevented Defendant from removing any of its funds, but it permitted new deposits to be made into the accounts. Ultimately, Defendant was convicted and its accounts were forfeited as property constituting Defendant's interest in a RICO enterprise pursuant to 18 U.S.C. § 1963(a)(2)(A).

While the restraining order was in effect, Claimant sent money by wire to Defendant's account with instructions to forward the money to a third party. The payment was received by Defendant's bank and credited to its account, but no further transfer was made to the intended third party. The money thus remained in the account when the Order of Forfeiture was entered in the criminal case. Claimant then attempted to recover its money by filing a claim in the ancillary proceeding, alleging that because the money was transferred to Defendant by mistake the money still belonged to Claimant and not to Defendant.

The government moved to dismiss the claim for lack of standing, and the district court agreed. To have standing to contest a criminal forfeiture order under section 1963(1)(2), a claimant must assert a legal interest in the specific property that is subject to forfeiture. A general creditor lacks the requisite ownership interest in a defendant's bank account to satisfy the standing requirement. Thus, the issue was whether Claimant retained ownership of the funds transferred to Defendant's account, or whether Defendant was the owner.

Ownership issues are governed by state law. Under New York law, Article 4A of the Uniform Commercial Code, a wire transfer is complete when a beneficiary's bank accepts a payment order. It makes no difference if the beneficiary's account is subject to restraint at the time of the transfer. So, when Defendant's bank accepted the payment order from Claimant and credited Defendant's account, the funds became part of the general estate of the Defendant.

and Claimant, who had voluntarily transferred his money to Defendant's account, became a mere creditor with a cause of action against Defendant for the return of the money. As a general creditor, Claimant lacked standing to contest the forfeiture.

This result was just, the court said, because the ancillary proceeding in a criminal case exists for only one purpose: to ensure that the property being forfeited belongs to the defendant. "It does not attempt to divide the defendant's estate among competing claimants." The latter task is better left to the Attorney General who has the power under her remission authority to distribute forfeited funds to the defendant's creditors, or to a liquidation proceeding where the defendant's remaining assets may be parceled out to its creditors.

Claimant then attempted to challenge the forfeiture order on another ground: because the funds were transferred to Defendant's account after the account was restrained by the government, the money could not have been traceable to or involved in the RICO offense that gave rise to the forfeiture. The government responded that third-party claimants in ancillary proceedings cannot challenge the forfeitability of the property if they don't own it. Thus, the government argued, having found that Claimants were not the owners of the property and lacked

standing to challenge the forfeiture, the court did not need to reach the forfeitability issue.

The court side-stepped this argument, proceeded to the merits of the challenge to the forfeitability of the property, and rejected it. RICO forfeitures, the court held, are not limited to the proceeds of the underlying offense or property used to commit it. The purpose of RICO forfeiture under section 1963(a)(2)(A) "is to separate the assets from the convicted racketeer, thereby destroying the underlying economic base." The court continued, "Under subsection (a)(2), all of a RICO defendant's interests in an enterprise, including the enterprise itself, are subject to forfeiture in their entirety, regardless of whether some portion of the enterprise is untainted by racketeering activity."

Accordingly, all property held by Defendant at the time the Order of Forfeiture was entered was properly forfeited to the United States, regardless of when or how Defendant acquired it. *SDC*

United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Pacific Bank), ___ F. Supp. ___, 1997 WL 79773 (D.D.C. Feb. 13, 1997).
Contact: AFMLS Attorney Stefan D. Cassella, CRM07(cassella).

Comment: The three preceding cases, *Ribadeneira*, *Kahn* and *BCCI*, all stand for the same proposition – that general creditors cannot contest the forfeiture of the defendant's bank account, even if they can trace their funds into the account. The issue arises in both criminal and civil cases and in different factual contexts, but the result is the same. Whether the claimant holds a check drawn on the defendant's account, as in *Ribadeneira*, gave the defendant money to deposit into his account, as in *Kahn*, or

wire transferred the money to the defendant by mistake, as in *BCCI*, the claimant is only a general creditor of the defendant; he has no ownership or possessory interest in the funds in the account. In all of these cases, of course, the key fact was that the claimants voluntarily transferred title to their money to the defendant. The case would be different if, for example, the defendant had stolen the claimant's money, and thus, never acquired title to it under state law. *SDC*

Standing / Money Laundering / Innocent Owner / Good Hearing / Excessive Fines

- Corporation that defendant used as nominee lacks standing to contest forfeiture of defendant's property.
- Property concealed from bankruptcy court is proceeds of bankruptcy fraud, and may be forfeited if involved in a subsequent money laundering offense.
- An "innocent owner" in a money laundering forfeiture case must show that he was unaware of the financial transaction that constitutes money laundering; whether he knew the transaction was illegal is irrelevant.
- *James Daniel Good* does not apply to the seizure of a motor home, even if it was used as a residence.
- The Excessive Fines Clause is not violated by the forfeiture of property involved in a money laundering offense that is traceable to criminal proceeds.

Defendant perpetrated a bankruptcy fraud by transferring certain assets to a corporation he controlled and by failing to reveal the existence of those assets to the bankruptcy court. Subsequently, the corporation sold the assets, including parcels of real property, and used the proceeds of the sale to purchase a motor home valued at \$275,000. The motor home was used exclusively by Defendant and his wife.

The government seized the motor home and instituted civil forfeiture proceedings under 18 U.S.C. § 981(a)(1)(A), alleging that the motor home represented property involved in a money laundering offense. The corporation filed a claim, asserting that it was the innocent owner of the vehicle.

In a lengthy and detailed opinion, the district court dismissed the corporation's claim for lack of standing. "A search for standing in civil forfeiture cases looks beyond the formal title to determine whether the record owner is the 'real' owner or merely a 'strawman' set up either to conceal illegal dealings or to avoid forfeiture." Here, although the corporation held legal title to the motor home, the court found that Defendant exercised exclusive dominion and control

over it and was therefore the true owner. For example, Defendant paid all expenses related to the maintenance of the property, did not pay any rent to the corporation for its use, and was, along with his wife, the only insured driver. Hence, the corporation lacked standing to contest the forfeiture.

The court also rejected all of the corporation's substantive objections to the forfeiture. First, the court held that property concealed from a bankruptcy court is the "proceeds" of a bankruptcy fraud under 18 U.S.C. § 152. Thus, the real property held by the corporation that should have been revealed to the bankruptcy court represented the proceeds of "specified unlawful activity" ("SUA") for money laundering purposes. When the real property was sold, the proceeds of the sale likewise represented SUA proceeds.

When Defendant used the SUA proceeds to buy the motor home, he concealed his connection to the money by passing it through bank accounts held in third-party names. Hence, the purchase of the motor home constituted a money laundering offense in violation of section 1956(a)(1)(B)(i) – conducting a financial transaction with the intent to conceal or

disguise the ownership or control of SUA proceeds. Because the motor home was the object of the financial transaction that constituted the section 1956 offense, it was "involved in" the money laundering for purposes of section 981 and was subject to forfeiture.

Next, the court rejected the corporation's innocent owner defense. The defense under section 982(a)(2) requires a claimant to prove only a lack of knowledge of the money laundering offense; it does not contain a "lack of consent" requirement, and thus, does not obligate the claimant to show that he took all reasonable steps to prevent the illegal use of his property. Following several recent decisions on this point, however, the court held that "lack of knowledge" meant lack of knowledge of the financial transaction that was charged as money laundering. It is not a defense that the claimant did not know that the financial transaction was illegal. Because the corporation was well aware of the purchase of the motor home – the act which constituted the money laundering offense – it could not be an innocent owner

under section 981(a)(2). Finally, the court rejected two constitutional defenses to the forfeiture: (1) the requirement of prior notice and an opportunity to be heard before real property is seized for forfeiture, *see United States v. James Daniel Good Real Property*, discussed *infra*, does not apply to a motor home, even if it is used as a residence; and (2) the Excessive Fines Clause of the Eighth Amendment is inapplicable to the forfeiture of criminal proceeds. Regarding the latter point, it apparently makes no difference whether the property is forfeited under a "proceeds" statute, such as 21 U.S.C. § 881(a)(6), or as "property involved in" a money laundering offense, as long as the property is traceable to SUA proceeds. SDC

United States v. One 1988 Prevost Liberty Motor Home, ___ F. Supp. ___, 1996 WL 774089 (S.D. Tex. Dec. 3, 1996). Contact: AUSA Mike Schwartz, ATXS01(mschwartz).

Comment: Other recent cases to adopt a similar view of the innocent owner defense in money laundering forfeiture cases include the following: *United States v. 5709 Hillingdon Road*, 919 F. Supp. 863 (W.D.N.C. 1996) (to defeat innocent owner defense, government need only show claimant had knowledge of the acts constituting money laundering (structuring); it is not necessary to show claimant knew the acts were illegal); *United States v. Rogers*, 1996 WL 252659 (N.D.N.Y. May 8, 1996) (innocent owner defense rejected where claimant was present when

defendant used structured cashiers checks to purchase car).

The leading case on whether forfeiture of the amount of money laundered is excessive under the 8th Amendment is *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995) (forfeiture of entire amount laundered, even though defendant retained only a fraction as his commission, is not excessive because it is "quite rational based on a proportionality analysis.")

SDC

Good Violation

- Fourth Circuit holds that *Good* violation does not immunize property from forfeiture.
- The government must return to the claimant the amount of profit or net rent derived from the property from the time of the illegal seizure until the date of the first adversarial hearing on the forfeiture.

The defendant property, a strip shopping center, was seized in 1989 as property traceable to drug trafficking and hence forfeitable under 21 U.S.C. § 881(a)(6). The government alleged that the property, worth approximately \$300,000, had been purchased and developed by a drug trafficker who placed title to the property in the name of his aunt. The aunt operated a cosmetology business on the property but her adjusted gross income for the five years prior to development of the property was approximately \$2,700/year.

In January 1993, summary judgment of forfeiture was entered and the aunt's claim was dismissed. This order was reversed on appeal in November 1993 because the district court had failed to recite whether it had conducted de novo review of the magistrate's recommendation that summary judgment be granted. In the interim, the government continued to collect rents from the tenants on the property. On remand, the court determined that the defendant property had been seized without affording the owners prior notice or opportunity for a hearing in violation of *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). However, it denied the aunt relief on grounds that her property interest had been forfeited. The Fourth Circuit affirmed in part and reversed in part.

The court held that *Good* applied retroactively to this case because it was pending on direct appeal at the time *Good* was decided. It noted, however, that the circuits are not in agreement as to the appropriate remedy for a *Good* violation. The Eighth and Eleventh Circuits hold that dismissal of the forfeiture case is appropriate, while other circuits hold that a *Good* violation does not immunize the property from forfeiture. The panel adopted the latter view.

It held, however, that the government must account for the profits or net rents that it denied the claimants during the period of the illegal seizure — i.e. the time from the illegal seizure until the claimant received an adversarial hearing on the forfeiture. In this case, the magistrate judge's hearing on the summary judgment motion in November 1991 fulfilled *Good*'s adversarial hearing requirement. Hence, the government was required to account for the seizure of all rents derived from the defendant property from the date of the seizure until the date of the summary judgment hearing. *HSH*

United States v. Marsh, ___ F.3d ___, 1997 WL 37122 (4th Cir. Jan. 31, 1997). Contact: AUSA Fred Williams, ANCC01(fwilliam).

Comment: This decision is significant in that it is the first appellate decision to accept the government's position that to the extent an owner is entitled to return of rents at all for a *Good* violation (see commentary to *Incline Village*, *infra*),

he/she is entitled only to return of net, not gross, rents. It also is part of a growing majority of circuit courts rejecting dismissal of the forfeiture complaint as the remedy for a *Good* violation.

HSH

Good Violation

- Claimant who was joint owner of seized property is entitled only to return of his proportionate share of net rents as remedy for *Good* violation.
- Claimant is entitled to return of rents even if property was acquired with drug proceeds and rents themselves therefore constitute proceeds.

This case arose on remand from the Supreme Court's decision in *United States v. Degen*, 116 S. Ct. 1777 (1996), holding that summary judgment was improperly entered against claimant Brian Degen, a fugitive, under the "fugitive disentitlement doctrine." The Court held that the doctrine does not apply in civil forfeiture cases. On remand, Brian Degen filed a motion for return-of-gross-rents, dismissal of the forfeiture complaint, and suppression of the evidence based on the seizure of several parcels of real property in 1989 without pre-seizure notice and opportunity for a hearing in violation of *James Daniel Good Real Property*, retroactively applied.

The government opposed the motion, arguing that: (1) claimant was foreclosed by principles of *res judicata* from asserting the *Good* violation based on the failure of his spouse to seek the remedy despite full opportunity to do so when she filed a separate claim to the property; (2) claimant had no legal right to possession of the rents in question in that they derived from real property that had been purchased with drug proceeds and therefore were themselves traceable to the proceeds of drug trafficking; (3) claimant was entitled to only nominal damages not to exceed \$1.00 under the Supreme Court decision in *Carey v. Piphus*, 435 U.S. 247 (1978), unless he could demonstrate that had he been afforded timely due process the result of the case would have been different (i.e., that probable cause for the seizure would not have been established); (4) claimant was entitled to only net, not gross, rents and only to the extent of his interest in the jointly-owned real property; (5) dismissal of the forfeiture complaint was not a proper remedy; and (6) suppression of evidence was not proper in this case because valid search warrants had been executed on the real properties either prior to or contemporaneously with the seizure

warrants, thus implicating the "independent source" and "inevitable discovery" exceptions to the exclusionary rule. The court granted the motion in part and denied the motion in part.

As a preliminary matter, the court said that a *Good* violation is properly asserted by pre-trial motion pursuant to Rule E(4)(f) of the Supplemental Rules for Certain Admiralty and Maritime Claims. It also held that the government's *res judicata* argument was precluded because it had been raised in the briefs before the Supreme Court, yet the Court remanded with instructions that claimant's defenses to the forfeiture action be considered.

The court then rejected the argument that the return-of-rents remedy is improper where the rents themselves are traceable to the proceeds of crime. The remedy does not depend on the illicit nature of the rents, the court said, but on the legitimacy of the procedures employed by the government.

Moreover, the court said that the government's argument that claimant is entitled to only nominal damages not to exceed \$1.00 under *Carey v. Piphus* cannot be squared with Ninth Circuit decisions approving the return-of-rents and suppression of evidence as the appropriate remedy for a *Good* violation. However, the court agreed that claimant was entitled only to net, not gross, rents with allowance made for deduction of costs and expenses. Also, claimant was entitled only to his proportional share of the rents relative to that of his spouse whose interest was previously forfeited.

The court agreed that dismissal of the forfeiture complaint is not a proper remedy for a *Good* violation. Mention of this remedy in *United States v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1995), was *dicta*. Ninth Circuit

law is that an illegal seizure, standing alone, will not immunize an asset from forfeiture.

Finally, the court held that any evidence obtained directly or indirectly as a result of the seizures must be suppressed. This ruling only applies to seizures of the defendant real properties, however; it does not extend to the defendant personal properties. *HSH*

United States v. Real Property Located at Incline Village, CV-N-90-0130-ECR (D. Nev. Jan. 30, 1997). Contact: AFMLS Attorneys Harry Harbin and Mark Rubino, CRM07(harbin) and CRM07(rubino).

Comment: This case, like *Marsh, supra*, rejects dismissal of the forfeiture complaint as the remedy for a *Good* violation and holds that an owner is entitled only to net rents. It goes beyond other cases, however, and limits the return-of-rents remedy to an amount proportionate to the movant's interest in jointly-held real property. The government argued for the first time in this case that Degen was entitled to only nominal damages not to exceed \$1.00 unless he could make the showing required by *Carey v. Piphus*. The Court, without

citing *Carey*, rejected that argument holding that it was bound by Ninth Circuit approving the return-of-rents remedy. The government is considering various means of seeking appellate review of the Court's ruling on this issue and the "res judicata" issue. The government has filed a motion for reconsideration and clarification of the suppression order to permit consideration of the "independent source" and "inevitable discovery" (or any other) exceptions to the exclusionary rule.

HSH

Good Violation

- Remedy for *Good* violation is limited to recovery of net, not gross, rents and nominal damages for loss of use and right to control real property. Defendants are not entitled even to nominal damages for the removal of personal property.

Real property was seized for forfeiture in 1989 on a warrant issued *ex parte*. The property was alleged to be subject to forfeiture under 21 U.S.C. § 881(a)(6)-(7). Summary judgment of forfeiture was entered and the Seventh Circuit affirmed but remanded for consideration in light of the intervening decision in *United States v. James Daniel Good Real Property*.

On remand, the district court ruled that the government had failed to establish that the *ex parte* seizure was justified by exigent circumstances. While the case was on appeal, the government reached an agreement whereby \$91,932.60 in accrued rents (less costs of maintenance and satisfaction of a mechanic's lien) collected between the *ex parte* seizure and post-hearing forfeiture were returned to the claimant. The claimants, however, sought damages with respect to

the *ex parte* deprivation of their personal and real property. Nominal damages in the amount of \$1.00 were rewarded to the claimants.

First, the court held that Claimants are not entitled to recover damages for the seizure of their personal property (home appliances and furniture). This property is inherently mobile and easily removed. Hence, Defendants are not entitled to even nominal damages for the removal of personal property. Moreover, claimants' evidence consists solely of the market value of the seized property. This evidence is not relevant. Damages, if awardable at all, would be limited only to damages for the *temporary*, not the permanent, deprivation of the seized property.

In addition, the court rejected Claimants alleged damages for the loss of use and the right to control

real property consisting of their personal residence and other properties purchased for rehabilitation and subsequent rental. The court concluded that the payment of net rents had the effect of restoring the claimants' lost profits thus reducing their damages to zero for the following reasons. The claimants were not entitled to reimbursement of mortgage, tax, and utility payments made by them during the course of the seizure. They were entitled to lost profits only and these *expenses* are properly offset against the rents and cannot be recouped. Claimants' request for damages for "intangible injuries" resulting from the *ex parte* seizure was unsupported by any evidence. Given that claimants undeniably suffered a deprivation of due process but had proved no compensable damages whatsoever, they were entitled only to an

award of nominal damages in the amount of \$1.00 under *Carey v. Piphus*, 435 U.S. 247 (1978).

The rehabilitated real properties were ultimately forfeited as property traceable to drug proceeds under 21 U.S.C. § 881(a)(6). The rents on these properties were returned to claimants pursuant to the settlement agreement. However, had they not been so returned, the rents themselves would have constituted the traceable proceeds of drug trafficking and thus be subject to forfeiture.

HSH

United States v. All Assets and Equipment of West Side Building Corp., 1997 U.S. Dist. LEXIS 150 (N.D. Ill. Jan. 9, 1997). Contact: AUSA Ramune Rita Kelecius, AILN02(rkeleciu).

Comment: This case is significant in a number of respects. First, it limits the recovery of accrued rents to *net*, not gross, rents and concludes that the recovery of such rents fully compensates claimants for the temporary deprivation of property worked by a *Good* violation. Second, it recognizes the applicability of *Carey v. Piphus* in the context of a *Good* violation and limits

"damages" (beyond net rents) for the *Good* violation to a nominal sum not to exceed \$1.00 absent firm proof of other compensable damages. Third, the court suggests, contrary to the *Incline Village* decision, *supra*, that rental income on property purchased with drug proceeds is itself subject to forfeiture under 21 U.S.C. § 881(a)(6) and need not be returned to the claimant.

HSH

CMIR Forfeiture / Excessive Fines

- District court in Florida upholds CMIR forfeiture. Forfeiture of entire amount of unreported currency is not excessive.

Defendants were at the Miami airport preparing to board a flight to Bogota, Colombia, when U.S. Customs inspectors found \$237,282 carefully concealed in defendants' checked-in luggage (e.g., much of the currency was found in the plastic housing of a television set; other currency was found in diaper boxes). The inspectors thereupon approached defendants, explained the CMIR currency reporting requirement and gave them CMIR forms. One defendant stated on the form that he was transporting

\$9,200 in currency and the other stated that he had \$8,400 in currency. Defendants were arrested and pleaded guilty to willfully violating the CMIR currency reporting requirement, 31 U.S.C. §§ 5316 and 5322, and agreed to a bench trial as to the criminal forfeiture of the currency.

The court rejected their defense that the currency was to be used to purchase watches and electronic goods in Colombia. It found that both defendants had, at various points, lied to both Customs and the

court and that one of the defendants had previously been arrested twice as a money courier for what were believed to be narcotics organizations. It found that the defendants knew or were made aware of the CMIR reporting requirements and had consciously disregarded them, and that there was a "strong likelihood" that the currency and the defendants were part of a money laundering operation.

Nevertheless Defendants argued that the criminal forfeiture of the seized currency violated the Excessive Fines Clause, citing the Eleventh Circuit's decision in *United States v. Dean*, 80 F.3d 1535, modified, 87 F.3d 1212 (11th Cir. 1996) (now vacated), and the Ninth Circuit's decision in *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996). The court distinguished *Dean*, declined to follow *Bajakajian* and upheld forfeiture of the entire \$237,282.

Under the Eleventh Circuit's excessive fines standard, the court was required to look at whether the forfeiture was "grossly disproportionate" in light of defendants' criminal activities, the source of the monies and the loss sustained. Regarding the loss sustained, the court said it was relevant to consider the purpose of the CMIR statute. It found that the currency reporting regulations were enacted to assist in the investigations of criminal, tax and regulatory violations, even when the money was legitimately derived, and that forfeiture of the currency is rational in view of the need to fight the underground economy, tax avoidance, money laundering, and other criminal activities.

Regarding the defendants' criminal conduct, the court said that one of the two defendants had previously been arrested as a currency courier and, on each occasion, the money had been forfeited. Both defendants knew of the reporting requirements and consciously lied and grossly under-reported the amounts they were transporting. The court also noted that the amount to be forfeited was less than the maximum criminal fine (\$250,000) that could be imposed under 31 U.S.C. § 5322.

Finally, the court held that Defendant's reliance on *Dean* was misplaced. *Dean* involved a civil CMIR forfeiture where the money was lawfully obtained and was to be used for a lawful purpose. In the instant case, the evidence suggested that the money was neither lawfully obtained nor intended for a lawful purpose. Thus, *Dean* was distinguishable.

For the same reasons, the court declined to follow *Bajakajian*. Moreover, it noted that *Bajakajian* entirely obviated a statute enacted by Congress, a result the district court considered unwarranted.

HSH

United States v. Delgado, No. 96-593-CR-Moore (S.D. Fla. Jan. 15, 1997). Contact: AUSA Randy A. Hummel, no e-mail available.

Comment: This case provides a useful and meaningful distinction to *Dean* and *Bajakajian*. It is noteworthy that *Dean* has been vacated and a motion for issuance of the mandate has been denied without explanation; hence, it is quite possible that the Eleventh Circuit is reexamining the decision notwithstanding the earlier

denial of the government's petition for rehearing. *Bajakajian* may very well be headed for the Supreme Court. It is currently pending in the Solicitor General's Office with a recommendation by the United States Attorney's Office, AFMLS, and the Appellate Section, Criminal Division, that a petition for certiorari be filed.

HSH

Excessive Fines

- **Forfeiture of real property on which drugs were buried was not excessive under the 8th Amendment because the property was an instrumentality of this crime, and its value was less than the maximum statutory fine.**

The defendant property, with a market value of \$47,700, was forfeited in 1992 under 21 U.S.C. § 881(a)(7), after the owner was convicted of drug offenses related to the forfeiture. Drugs were found buried on the property. The owner filed a motion for return of property in 1995, arguing that the post-conviction forfeiture of his property violated double jeopardy and also challenging the forfeiture under the Excessive Fines Clause. The district court granted the motion on double jeopardy grounds and ordered return of the property. The Tenth Circuit reversed.

Because post-conviction forfeiture of property does not violate double jeopardy, *see United States v. Ursery*, 116 S. Ct. 2135 (1996), the court held that it would have to reverse the district court's order unless it found the forfeiture to be excessive under the 8th Amendment. It agreed to review the 8th Amendment claim *de novo*.

The Tenth Circuit established a two-step "instrumentality-proportionality" test of excessiveness in *United States v. 892 Calle de Madero*, 100 F.3d 734 (10th Cir. 1996). If the government satisfies the

instrumentality prong by establishing that there was a nexus between the property and the offense, the burden shifts to the claimant to show that the forfeiture was grossly disproportionate. The court found that the forfeiture clearly met the "instrumentality" prong since drugs were found buried on the property. The forfeiture also met the "proportionality" prong. The owner was sentenced to seven years in prison and no fine was imposed. The property was worth \$47,700. Defendant was convicted of three serious drug crimes and large amounts of cocaine and marijuana were found buried on the property. The maximum statutory fine for the cocaine convictions was \$2 million; for the marijuana convictions, \$250,000. Forfeiture of the property was therefore not disproportionate and the Excessive Fines Clause was not violated. *HSH*

United States v. One Parcel of Property (Edmonson), ___ F.3d ___, 1997 WL 47374 (10th Cir. Feb. 6, 1997). Contact: AUSAs Annette B. Gurney, AKS01(agurney), and Connie R. Calvert, AKS01(ccalvert).

Collection of Judgment

- **Dicta in First Circuit decision implies that the Federal Debt Collection Procedures Act can be used to collect a judgment in a criminal forfeiture case.**

After a deadbeat dad was ordered, pursuant to the Child Support Recovery Act (CSRA), 18 U.S.C. § 228, to make restitutionary payments, the United States sought to recover those payments pursuant to the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. §§ 3001-08. The First Circuit ruled against the government, holding that the FDCPA

provides a recovery mechanism only for indebtedness to the United States. The indebtedness of the deadbeat dad was not to the United States. In construing the scope of the FDCPA, however, the First Circuit offered the following dicta:

Some restitutionary orders create debts that owe beneficially to the federal

government and thus fall within the purview of the FDCPA. A prototypical case is *United States v. Gelb*, 783 F. Supp. 748 (E.D.N.Y. 1991). *Gelb* involved restitution under the RICO statute. Since that statute declares that a convicted person must "forfeit to the United States" any ill-gotten gains, see 18 U.S.C. § 1963(a), the federal government is the direct beneficiary of the restitution order and the order thus creates a debt collectible under the FDCPA. See *Gelb*, 783 F. Supp. at 752. But other types of restitution, which, when paid, will not increase public

revenues (say, restitution to an individual victim of a crime), do not come within the statutory encincture.

In *Gelb*, the United States dismissed its forfeiture claim in favor of an order of restitution issued after *Gelb* was convicted under RICO. It then sued *Gelb* under the FDCPA for the restitution ordered. Since *Gelb* was convicted of "falsification of postage," the restitution was payable to the United States. *BB*

United States v. Bongiorno, ___ F.3d ___, 1997 WL 42994 (1st Cir. Feb. 7, 1997). Contact: AUSA Christopher Alberto, AMA01(calberto).

Comment: It would be useful to be able to use the FDCPA to recover upon a money judgment entered in a criminal forfeiture case. 28 U.S.C. § 3002 defines a "debt" as "an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or any other source of indebtedness to the United States" (emphasis supplied). We are not aware, however, of

any decision determining whether the FDCPA can be used in this fashion, and the principle of *ejusdem generis* might apply. If any AUSA has had experience with attempting to utilize the FDCPA for this purpose, we would appreciate being advised so that we will be able to apprise other U.S. Attorneys' Offices of that experience. We solicit, from any AUSA with such experience, an article for the *Asset Forfeiture News*. Please fax your submission to the Editor at (202) 616-1344 or call at (202) 514-1758.

BB

Administrative Forfeiture / Statute of Limitations

- Civil actions for return of seized property must be brought within six years of the accrual of the cause of action.
- Date of accrual of cause of action for return of seized property under the Tucker Act or the Federal Torts Claims Act is date that Plaintiff knew or had reason to know of the seizure.
- Date of accrual of cause of action for return of seized property under the Administrative Procedure Act is date that the final administrative forfeiture decision was made.

In October 1979, Drug Enforcement Administration (DEA) agents seized approximately \$245,000 from the residence and safe deposit boxes

of a drug dealer in connection with his arrest. In February 1980, the drug dealer pleaded guilty to a drug conspiracy charge. During his allocution on the

plea and in his Motion for Reduction of Sentence a year later, the drug dealer acknowledged that the seized \$245,000 was proceeds of the drug conspiracy and subject to forfeiture. However, sixteen years later, in November 1995, the drug dealer moved for return of the seized \$245,000 pursuant to Rule Fed.R.Crim.P. 41(e).

The court ruled that once a criminal case has been concluded, a motion under Fed.R.Crim.P. 41(e) is treated as new civil action and construed as a civil complaint under the Tucker Act, 28 U.S.C. § 1346(a)(2) (for property valued under \$10,000); the Administrative Procedure Act (APA), 5 U.S.C. § 702; the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq.; or as a civil equitable proceeding. The court further ruled that such actions must be commenced within six years after the right of action first accrues, in accordance with 28 U.S.C. § 2401.

The court concluded that, construed as a civil equitable proceeding or as an action brought under the Tucker Act or the FTCA, the drug dealer's claim accrued on the date of seizure in 1979. Given the dealer's knowledge of the seizures, as indicated by his statements at the time of his plea and Motion for Reduced Sentence, and given the absence of any reason to toll the statute of limitations, these theories of recovery were time-barred.

To the extent that the dealer's claim could be construed as challenging the propriety of DEA's forfeiture proceedings under the APA, the court ruled that the claim accrued on the date the final administrative forfeiture decision was made. No evidence of the date of administrative forfeiture was available; however, the court reasoned that because the statute of limitations governing administrative forfeitures (19 U.S.C. § 1621) requires forfeiture actions to be brought within five years after the time of the discovery of the underlying offense, any administrative forfeiture of the \$245,000 must have commenced by October 1984, five years after the drug dealer's arrest in October 1979. Thus, the court reasoned, the drug dealer filed his recovery action at least 11 years after the administrative forfeiture action was commenced. Since the administrative forfeiture would not have taken five years to complete, the dealer's recovery action was time-barred and dismissed under the APA. JHP

Mullins v. United States, 1996 WL 55946 (S.D.N.Y. February 11, 1997) (unpublished).
Contact: AUSA Martine M. Beamon,
ANYS02(mbeamon).

Comment: For a detailed discussion of the various theories that courts have allowed for contesting administrative forfeitures and the statutes of limitations applicable to

them, see AFMLS Trial Attorney Gregory A. Paw, "Judicial Review of Administrative Forfeitures," *Asset Forfeiture News* (January/February 1996): 1. JHP

Administrative Forfeiture / Notice

- **Second Circuit affirms that notice of administrative forfeiture mailed to prisoner's attorney in then-pending related criminal case constituted sufficient notice to satisfy due process despite government's failure to send notice to prisoner at his place of incarceration.**

The FBI began an administrative forfeiture of seized money shortly after the defendant was arrested, and while the prisoner was in federal custody, sent written notices of the administrative forfeiture action to the prisoner's pre-incarceration addresses and to a city jail. These written notices were returned as undeliverable. The FBI also mailed notice to the prisoner's attorney of record in the then-pending criminal case. No claim was filed, and the money was forfeited administratively, but two years after his guilty plea to the criminal charges, the prisoner challenged the forfeiture on the grounds that his right to due process had been violated because he had not received notice of the forfeiture proceeding.

The prisoner relied on *Torres v. 36,256.80, 25 F.3d 1154* (2d Cir. 1994) (notice insufficient where government failed to send written notice to prisoner at his place of federal incarceration) and argued that the government could have determined that he was in federal custody and should have sent him written notice there. However, the district court dismissed the prisoner's suit on grounds that the FBI's written notice to the prisoner's attorney in the related criminal case was sufficient to satisfy due process. (The unpublished district court decision in this case, *Bye v. United States*, 1996 WL 185723 (S.D.N.Y. Apr. 18, 1996), was summarized in the *Quick Release* (May 1996): pp. 19-20.

On appeal, the Second Circuit stated that it "continues to be mystified" concerning why a Department of Justice agency could not determine the location of a person in the custody of another agency of the same Department. Nevertheless, the panel affirmed the district court's dismissal of the prisoner's suit. The Second Circuit distinguished *Torres*. In *Torres* the government had sent no notice letters other than the undeliverable letters to the prisoner at addresses other than his place of incarceration. In this case, the government also sent notice to, and received acknowledgement of the receipt by, the attorney who represented the prisoner in his then-pending related criminal proceeding. The court concluded that the notice sent to the attorney satisfied due process because it was reasonably calculated under the circumstances to notify the prisoner of the pendency of the administrative forfeiture and to afford him an opportunity to present his objections. JHP

Bye v. United States, ___ F.3d ___, 1997 WL 38160 (2d Cir. Feb. 3, 1997). Contact: AUSA Kathleen Reidy, ANYSC01(kriedy) or

Administrative Forfeiture / Notice / Standing

- Adequacy of government's notice of administrative forfeiture is open to due process challenge where, among other factors, the government had knowledge of plaintiff's true name, but used his alias to mail him notice of the forfeiture proceeding.
- Plaintiff's conscious possession of the property seized was sufficient for standing to contest its forfeiture, despite his lack of ownership.

Plaintiff carried and displayed a large quantity of cash during a cocaine purchase. He was arrested and the cash was seized for forfeiture. After his arrest, plaintiff used an alias to identify himself to the arresting agents; but in the related criminal prosecution, the indictment identified plaintiff by his true name and indicated his use of the alias.

Meanwhile, Drug Enforcement Administration (DEA) commenced administrative forfeiture proceedings against the seized cash and sent written notices by certified mail to plaintiff at the jail where he was incarcerated, at the street address that he provided with the alias, and at the address of a co-defendant. All three notices were addressed using plaintiff's alias, and all were returned to DEA undelivered. When DEA received no claims, it forfeited the seized cash administratively.

Several years later, plaintiff sued the government for return of the administratively forfeited cash alleging that his due process rights had been violated when DEA failed to notify him of the forfeiture proceedings. The government moved to dismiss the suit for failure to state a claim for which relief could be granted (Fed.R.Civ.P. 12(b)(6)), or in the alternative, for summary judgment (Fed.R.Civ.P. 56). On the record then before it, the district court denied the government's motion.

The court found that the adequacy of the government's notice of the administrative forfeiture was open to question for several reasons. The government knew, but failed to use, plaintiff's real name when it mailed him notice of the forfeiture. The government also appeared to have made only a

minimal effort to ascertain plaintiff's correct residence address. Moreover, the government presented no evidence to indicate that plaintiff received some form of actual notice of the administrative forfeiture action that might enable the court to excuse the problems with the government's notice attempts. The court noted, however, that it was only denying the government's motion to dismiss. It did not preclude the possibility that additional evidence might turn up during discovery to establish the reasonableness of the government's actions under the circumstances.

Alternatively, the government argued that even if its notice to plaintiff was inadequate, his claim must fail for lack of standing to contest the forfeiture. Plaintiff admitted that the seized cash did not belong to him but was given to him by someone else to buy cocaine. The court held, however, that possession is sufficient for standing in the Second Circuit, as long as the claimant is aware that the property is in his possession and he exercises control over it. *Mercado v. United States Customs Service*, 873 F.2d 641, 644-45 (2d Cir. 1989). The court reasoned that plaintiff's assertion of a possessory interest together with his explanation of the possession (i.e., that he was given the money in order to complete a drug transaction with it) indicated a knowing possession that was sufficient to establish his standing. JHP

Olivo v. United States, 1997 WL 23181 (S.D.N.Y. Jan. 22, 1997) (unpublished). Contact: AUSA Evan T. Barr, ANYS01(ebarr).

Administrative Forfeiture / Motion for Return of Property

- Court has jurisdiction to consider motion for return of property if government fails to initiate judicial forfeiture proceedings after claimant files claim and cost bond.

Claimant filed a civil action for the return of property seized by the government for forfeiture. DEA responded by initiating administrative forfeiture proceedings. Normally, the commencement of such proceedings will divest the district court of jurisdiction over a motion for the return of seized property. See *United States v. One Jeep Wrangler*, 972 F.2d 472 (2d Cir. 1992).

In this case, however, the claimant responded to the administrative forfeiture proceeding by filing a claim and *in forma pauperis* petition in lieu of a cost bond. DEA accepted the claim and petition and referred the case to the U.S. Attorney. Thus, at the time the government moved to dismiss the claimant's civil action, the administrative forfeiture proceeding was no longer pending, nor had the U.S. Attorney yet commenced a judicial forfeiture.

The court held that as long as neither an administrative nor a civil judicial forfeiture proceeding was pending, it had jurisdiction to consider claimant's civil action for the return of his property. Thus, the government's motion to dismiss the action for lack of jurisdiction was denied. The government was free, however, to ask the court to reconsider its motion once judicial forfeiture proceedings were commenced.

SDC

Stasio v. United States, 1997 WL 36981 (E.D.N.Y. Jan. 17, 1997) (unpublished). Contact: AUSA Rosanne M. Harvey, ANYE03(rharvey).

Comment: This brief opinion suggests that claimants may use Rule 41(e) or other bases for a civil action for the return of seized property not only to force the government to commence an administrative forfeiture action, as

has traditionally been the case, but also to force the U.S. Attorney to commence a civil judicial action (or presumably, a criminal forfeiture action) once a claim and cost bond have been filed.

SDC

Legitimate Source Defense

- Where claimant's testimony lacks credibility as to a legitimate source of currency, she has failed to prove her claim by a preponderance of the evidence.

Police officers arrested two individuals for cocaine violations. During the arrest, the officers seized \$15,200 found in the trunk of the car. The mother of one of the defendants filed a claim to the defendant currency. Claimant argued that she had a long time distrust of financial institutions and that she therefore had kept a sum of money in a small cosmetics case in

her son's closet. She stated that the money was taken without her knowledge. Since her income from employment was not significant, she claimed that the money came from other sources: her pension from previous employment; income from rental property in the Dominican Republic; income from child care; and child support payments from an ex-husband.

Claimant's tax returns stated income in the area of \$3,000-4,000 per year while her monthly expenses were approximately \$1,200.

The court held that although claimant presented evidence that the currency was taken from her without her consent or knowledge, she did not do so by a preponderance of the evidence. Only two of the five sources of income that she claimed could be verified at trial. Claimant had a negative cash flow, as evidenced by her approximately \$4,000 per year income offset by monthly expenses nearing \$1,200. Additionally, while she purportedly distrusted financial

institutions, claimant's testimony revealed that she had bank accounts in the United States and the Dominican Republic prior to her arrival to the United States. Based on the credibility problems with claimant's innocent owner defense, the court denied her claim to the currency. *MML*

United States v. \$15,200 in United States Currency, No. EV 96-60-C R/H (S.D. Ind. December 31, 1996) (unpublished). Contact: AUSA Winfield Ong, AINS01(wong).

Criminal Forfeiture

- **The only way a defendant may challenge a criminal forfeiture order is on direct appeal. Neither Rule 60(b), F.R.Civ.P., Rule 35 F.R.Crim.P., nor 28 U.S.C. § 2255 apply to criminal forfeiture orders.**

Defendant was convicted of certain drug offenses and sentenced to prison. As part of her sentence, the court entered a criminal forfeiture order pursuant to 21 U.S.C. § 853, forfeiting two parcels of real property to the government. Defendant did not object to the enter of the forfeiture order at trial, nor did she file a direct appeal.

Subsequently, Defendant filed a Motion for Relief from Final Judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, claiming that the forfeiture order was invalid because a jury had not returned a special verdict in compliance with Rule 31(e), Federal Rules of Criminal Procedure. The district court denied the motion, and Defendant appealed.

The Seventh Circuit, in an unpublished opinion, affirmed. As an initial matter, the court said, Defendant could not use the Rules of Civil Procedure to challenge a forfeiture order entered in a criminal

case. "Forfeiture under section 853(a) is an element of the sentence imposed for a criminal violation of federal drug laws." Because Rule 60(b)(6) allows a party to move for relief only from a judgment or order in a civil case, Defendant could not challenge the criminal forfeiture order under that Rule.

Nor could Defendant have filed her motion under the Criminal Rules. Rule 35 authorizes a district court to correct or reduce a sentence only upon remand from an appeal, upon motion of the government within one year of the imposition of sentence, or within seven days of the imposition of sentence to correct a "clear error." None of these conditions applied to Defendant's belated contention that the forfeiture order failed to comply with the special verdict requirement in Rule 31(e).

Next, the court rejected the notion that Defendant could have challenged the criminal forfeiture order under 28 U.S.C. § 2255. That statute allows a

person "in custody . . . claiming the right to be released" to bring a collateral challenge to her continued detention. It does not authorize courts to grant relief from monetary penalties. It has long been the rule, the court said, that section 2255 does not authorize federal courts to grant *habeas corpus* relief from criminal fines. "We see no reason that the result should differ in cases in which the petitioner seeks relief from monetary penalties in the form of forfeiture of property."

Finally, the court rejected the contention that Defendant's motion should be considered a writ of

coram nobis. "Although a writ of *coram nobis* is still available in criminal cases, it is unavailable for claims that could have been raised on direct appeal." The court concluded that direct appeal was Defendant's only remedy from the alleged failure to comply with the special verdict requirement. SDC

United States v. Ramsey, 1997 U.S. App. LEXIS 565 (7th Cir. Jan. 9, 1997) (unpublished). Contact: AUSA William J. Lipscomb (E.D. Wis.), AWIE01(wlipscom).

Double Jeopardy

■ *Ursery* applies retrospectively.

During the period between the Ninth Circuit's decision in *United States v. \$405,089.23* and the Supreme Court's rejection of the double jeopardy argument in *United States v. Ursery*, Defendant filed a section 2255 motion challenging his criminal conviction on double jeopardy grounds. When the district court granted the motion and vacated the conviction, the government appealed.

On appeal, Defendant argued that *Ursery* established a new rule of law that should not apply retroactively to his case. The Tenth Circuit disagreed.

Ursery, the court said, affirmed a long line of Supreme Court precedents holding that civil forfeiture did not implicate the Double Jeopardy Clause. Accordingly, "*Ursery* did not announce a new rule of law under the standard articulated in *Teague v. Lane*, 489 U.S. 288 (1989)." Thus, *Ursery* applies retroactively, and the order vacating Defendant's conviction was reversed. SDC

United States v. Emmons, ___ F.3d ___, 1997 WL 66158 (10th Cir. Feb. 18, 1997). Contact: AUSA Annette Gurney, AKS01(agurney).

EAJA Fees

- Sixth Circuit affirms denial of attorneys fees even though government's attempt to forfeit cash seized in airport stop ultimately failed.

The United States sought forfeiture of currency that was seized from the claimant as he exited an airplane. The stop was based on an anonymous tip that an individual fitting the claimant's description would be carrying illegal drugs. Although the claimant was not carrying any drugs, he was carrying large sums of cash. The government seized the cash and commenced forfeiture proceedings under 21 U.S.C. § 881(a)(6). Although the district court granted the government's motion for summary judgment, the Sixth Circuit reversed, finding that the government had failed to establish a substantial connection between the cash and illegal drug trafficking.

Claimant filed a petition for attorney fees under the Equal Access to Justice Act (EAJA). Under the EAJA provisions, a court "shall award to a prevailing party other than the United States fees and other expenses . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A); *Pierce v. Underwood*, 487 U.S. 552 (1988). The government's position is substantially justified if it is "justified to a degree that could satisfy a reasonable person." 487 U.S. at 565. In other words, the government must demonstrate that its litigation position was reasonable in law and fact. *Id.*

The district court ruled that the government's position was substantially justified in light of the following evidence: (1) claimant made a one-day trip to New York; (2) he was carrying large amounts of money which alerted a trained canine to the presence of narcotics; (3) claimant gave a false account of the business transacted on his trip and gave conflicting accounts about the ownership of the money, and (4)

claimant refused to identify the source of the money in response to the government's discovery requests. The district court also stated that, because the court had initially ruled in favor of the government on its motion for summary judgment, the government's position was reasonable.

Reviewing the district court's decision under the abuse of discretion standard, *Pierce v. Underwood*, 487 U.S. at 562, the Sixth Circuit affirmed. The panel stated that the district court did not abuse its discretion in finding that the government's position was reasonable under the facts of this case and existing case law. The panel noted that, although the Circuit had minimized the evidentiary value of the canine sniff in a decision issued subsequent to the district court's finding of probable cause, the district court could reasonably rely upon such evidence because the government's position must be measured under the law then in existence.

However, the court of appeals rejected the district court's second and independent basis for denying an award of attorney fees. The panel stated that the government's position must be measured in light of the law and facts, not on whether the government had some preliminary success on its motions. Thus, the erroneous entry of summary judgment does not, by itself, resolve the substantial justification issue.

Accordingly, the court of appeals affirmed the denial of attorney fees.

MDR

United States v. \$5,000 in U.S. Currency, 1997 U.S. App. LEXIS 280 (6th Cir. January 3, 1997) (unpublished). Contact: AUSA Kathleen L. Midian, AOLTN01(kmidian).

Habeas Corpus / Civil Rights Violation

- Habeas Corpus petition seeking return of property seized and forfeited by state construed as civil rights complaint under 42 U.S.C. § 1983.
- No federal remedy for return of wrongfully forfeited property if state law remedy provides adequate procedural due process.

Petitioner filed a habeas corpus petition alleging that his property was improperly seized and forfeited by the state. The district court determined that the complaint was "a challenge of other than a conviction or sentence" and exercised its discretion to construe the complaint as a civil rights action under 42 U.S.C. § 1983. The court then dismissed the complaint, stating that "a state agent who deliberately deprives a person of his property without authorization does not violate that person's right to procedural due process under the Fourteenth Amendment" because even if

petitioner is able to establish that the state wrongly deprived him of his property, "the availability of an adequate state court remedy, e.g., a state tort action, precludes relief because it provides adequate procedural due process."

DAB

Hines v. LeStrange, 1997 WL 37543 (N.D. Cal. 1997).

Marshals Service

- Government's seizure of hotel was for purpose of abating unlawful activity.
- Handyman was employed to assist the Marshals Service in the performance of official duties within scope of 18 U.S.C. § 111(b).

The government commenced civil forfeiture proceedings against the Kenmore Hotel in New York City. The warrant, issued pursuant to 21 U.S.C. § 881(b), stated that the hotel ownership had failed to take corrective action, despite numerous warnings over a period of three and one-half years, to stem narcotic-related activities occurring in the hotel. The warrant gave the Marshals Service the right to seize the hotel, to manage it pending a final resolution of the forfeiture action, and to handle the maintenance. The Marshals Service contracted with P&L, a private

company, to handle the day-to-day management of the hotel.

A handyman employed by P&L, along with a co-worker, went to a tenant's room to repair a hole in a wall. The tenant had submitted a work order for the repair, knew when the work was scheduled, and had given his permission for the work to be done.

During the course of the repair, the tenant complained loudly that the handyman was installing the sheetrock inside out, eventually pulling out a multi-

purpose kitchen knife and threatening him. While the co-worker left to get help, the tenant trapped the handyman, holding the knife to his head and screamed at him. The tenant eventually relinquished the knife, and was arrested by New York City police. He was charged by federal complaint with violating 18 U.S.C. §§ 111(b) and 1114, assault with a deadly weapon upon a person designated to assist the Marshals Service in the performance of official duties. After a jury trial, the tenant was convicted of the charge.

On appeal, the tenant argued, among other issues, that there was insufficient evidence that the handyman was engaged in official law enforcement duties on behalf of the Marshals Service at the time of the

assault. The Court disagreed and affirmed the conviction holding that the purpose of section 111 was to deter harm to certain federal officials and to deter interference with their law enforcement activities. The handyman was employed to assist the Marshals Service by making repairs to the hotel, and by making such repairs he was placed in a dangerous situation because it was the nature of the residents of the hotel and the ongoing criminal activity that had impelled the government to seize it. *LLG-E*

United States v. Matthews, ___ F.3d ___, 1997 WL 64459 (2d Cir. Jan. 3, 1997). Contact: AUSA Geoffrey Kaiser, ANYS01(gkaiser).

The case summaries and comments in *Quick Release* are intended to assist government attorneys in keeping up-to-date with developments in the law. They do not represent the policy of the Department of Justice, and may not be cited as legal opinions or conclusions binding on any government attorneys.

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Chief..... Gerald McDowell
Deputy Chief and
Special Counsel
to the Chief..... G. Allen Carver, Jr.
Assistant Chief..... Stefan Cassella
Editor..... Denise A. Mahalek
Design..... Elizabeth Kopp
and Denise A. Mahalek
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